

SANDLER REIFF

SANDLER REIFF LAMB
ROSENSTEIN & BIRKENSTOCK, P.C.

1025 Vermont Ave NW, Suite 300
Washington, DC 20005
www.sandlerreiff.com
T: 202-479-1111
F: 202-479-1115

December 12, 2016

Mr. Jeff S. Jordan
Assistant General Counsel
Office of Complaints Examination
and Legal Administration
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 7154

Dear Mr. Jordan:

I write on behalf of the Ohio Democratic Party ("ODP") to respond to a complaint filed by Kathleen M. Eagan (the "Complaint"), charging that the ODP has violated the Federal Election Campaign Act (the "Act"). As described below, the Commission should find there is no reason to believe that there has been a violation, as the ODP has fully complied with the Act and the Commission's regulations. Accordingly, the Commission should close the file on the Complaint, and take no further enforcement action against the ODP regarding Ms. Eagan's complaints.

I. Introduction to Allegations

Ms. Eagan alleges that the communication attached to the Complaint as "Exhibit A" lacked the required disclaimers under the Commission's regulations, and that it was a coordinated communication (and an in-kind contribution) from the ODP to each candidate whose picture appeared on the document. Exhibit A is a mailing paid for by the ODP with non-federal funds. The communication endorses more than thirty state and local candidates, supports local issues, and includes the pictures and names of five federal candidates. The communication does not support, attack, promote, or oppose the federal candidates, nor does it refer to their candidacy.

The Complaint also alleges that certain Internet communications, attached to the Complaint as Exhibits B, C, and D, lacked required disclaimers. However, Exhibits B, C, and D are printed pages from the ODP's website, which included the necessary disclaimer under federal law. To be certain, when the ODP printed these communications and distributed them, those printed versions each contained disclaimers that satisfy federal requirements, as seen in Attachments 2, 3, and 4 to this Response.

CFILA

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FEDERAL ELECTION COMMISSION

II. Ms. Eagan's Complaint Regarding Exhibit A Does Not Have Merit.

a. Federal Disclaimer Laws Do Not Apply to the Communication in Exhibit A

i. Exhibit A is Not Federal Election Activity

Exhibit A was properly paid for solely with non-federal funds. In addition, Exhibit A would not qualify as federal election activity. Therefore, Exhibit A is not subject to federal disclaimer laws. Exhibit A was a mailing that advocated exclusively for the election of state and local candidates. Exhibit A contained significant persuasion material regarding those state and local candidates and included pictures of federal candidates along with a statement that the federal candidates endorsed the state candidates.

Under the Act and Commission rules, a public communication that refers to clearly identified candidates for non-federal office is not federal election activity when it does not promote, support, attack or oppose ("PASO") a clearly identified federal candidate, unless it otherwise qualifies as a voter registration activity, generic campaign activity, get-out-the-vote activity, or voter identification.¹ As provided below, Exhibit A does not qualify as federal election activity.

As the Commission has explained, it would not PASO a federal candidate for a state candidate to have an advertisement publicizing a federal candidate's endorsement.² *On several occasions the Commission has found that "the mere identification of an individual who is a Federal candidate is not of itself tantamount to promoting, supporting, attacking, or opposing that candidate."*³ Here, Exhibit A is a public communication that was paid for with non-federal funds to advocate for state and local Democratic candidates and issues.⁴ The front side of the communication lists the names for thirty-one state and local candidates, advocates for six local issues, includes pictures and information related to a county Prosecuting Attorney and Recorder, and contains pictures of five federal candidates. Additionally, the entire back side of the mailing advocates for two judges for the state Supreme Court. The communication encourages Ohioans to "Join us in endorsing your state and local Democratic candidates" and to "vote [for the two identified judges] for [the] Ohio Supreme Court."⁵ *As a result, there is nothing in this communication to PASO a federal candidate; the mere inclusion of the federal candidates' names and pictures in connection with the endorsement of state and local candidates does*

¹ 52 U.S.C.A. § 30101(20); 11 C.F.R. § 100.24(c).

² See Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGhan, MUR 6113 (Kirby Hollingsworth, et al) at 7.

³ Advisory Opinion 2007-34 at 3 (Jackson Jr.) (citing Advisory Opinions 2007-21 (Holt), 2006-10 (Echostar), and 2003-25 (Weinzapfel)).

⁴ Since the concern is with the content of the communication and there was the PASO of a federal candidate, it would be irrelevant whether a non-federal candidate paid for the communication versus a state party.

⁵ See Complaint at Exhibit A; Attachment 1.

nothing to support or oppose any federal candidate; accordingly, there is no PASO of a federal candidate to trigger federal election activity.⁶

Exhibit A also would not constitute a "get-out-the-vote" activity under the Commission's rules because any reference to voting is "incidental" to the communication's message to encourage Ohioans to vote for the state and local candidates and issues on the mailing.⁷ The Commission's rules provide that *an activity "is not get-out-the-vote activity because it includes a brief exhortation to vote, so long as the exhortation is incidental to a communication, activity, or event."*⁸ The rules provide that it would not be a get-out-the-vote activity to have a mailer that "praises the public service record of mayoral candidate X and/or discusses his campaign platform. The mailer [could] conclude[] by reminding recipients, 'Vote for X on November 4th.'⁹ Here, as described above, *Exhibit A is focused on encouraging voters to support the state and local candidates and issues identified in the communication.* Specifically, in addition to referencing more than thirty state and local candidates and four local issues, the communication also praises the records of a local prosecuting attorney and recorder, as well as two state Supreme Court justices. In addition to providing information on the "impressive" backgrounds for the two state Supreme Court judges, Exhibit A further states that both judges are recommended by the Ohio State Bar Association and includes negative information related to their opponents. *Any references to voting are simply incidental to the overall message calling upon Ohioans to support these candidates and issues.*

As a result, since Exhibit A encourages Ohioans to support state and local candidates and only includes the pictures and names of federal candidates as a part of a message to "Join us in endorsing your state and local Democratic candidates" this *does not PASO any federal candidate.* Any reference to voting is with regard to the overall purpose of the communication and therefore does not constitute a get-out-the-vote activity, and there is nothing in Exhibit A or the Complaint to indicate it could be interpreted as voter registration activity, voter identification, or generic campaign activity.¹⁰ As such, this communication is not federal election activity, was properly paid for exclusively with non-federal funds, and not subject to federal disclaimer laws.

⁶ See 11 C.F.R. § 100.24(b)(3).

⁷ 11 C.F.R. § 100.24(a)(3).

⁸ 11 C.F.R. § 100.24(a)(3)(ii).

⁹ 11 C.F.R. § 100.24(a)(3)(ii)(A).

¹⁰ 11 C.F.R. § 100.24(a)(3). See 11 C.F.R. §§ 100.24(a)(2), 100.24(a)(4), 100.25.

ii. Exhibit A Satisfies Relevant *State Disclaimer Laws*

The ODP was diligent in following state law requirements for disclaimers on a persuasive communication for Ohio candidates. Ohio law requires that political parties include their name in a conspicuous place when issuing a political publication in support of candidates.¹¹ Exhibit A, provided here as Attachment A to this Response, demonstrates this has been satisfied on the upper left and right corners of the front side.

b. Exhibit A is Neither a Coordinated Communication nor is it a Contribution to Federal Candidates

In addition to alleging that a disclaimer violation occurred, the Complaint further alleges that Exhibit A constitutes a "coordinated communication" and would therefore be subject to the Act's contribution limitations. The Commission's rules and precedent show that Exhibit A is neither a coordinated communication nor is it a contribution to the federal candidates whose pictures appear on it. The ODP denies that the communication in Exhibit A was coordinated with any federal candidate, and the Complaint does not provide any evidence to show otherwise.

There is absolutely nothing in the Complaint to support an argument that this communication satisfies the "conduct" prong of a coordinated communication as defined by 11 C.F.R. § 109.21. The Complaint only alleges that the coordination is apparent "on [the mailing's] face."¹² The accusation of coordination is made without further substantiation or comment, and fails to meet the sufficiency standards for FEC complaints.¹³

Notwithstanding the above, this communication falls under a "safe harbor" exception to the definition of a coordinated communication.¹⁴ When the Commission added this safe harbor to its rules in 2006, it expressly provided that this was "fashioned consistent" with the legislative history of the Bipartisan Campaign Reform Act of 2002 ("BCRA") where Senator Feingold explained that "the relevant BCRA provisions would not prohibit 'spending non-Federal money to run advertisements that mention that [State candidates] have been endorsed by a Federal candidate . . . so long as those advertisements do not support, attack, promote, or

¹¹ See Ohio Rev. Code 3517.20(B), (F) (limiting the requirement that disclaimers include "paid for by" language to a "candidate, legislative campaign fund, or campaign committee").

¹² Complaint at 3.

¹³ See 11 C.F.R. §§ 111.4(c), 111.4(d)(2) ("The complaint should differentiate between statements based upon personal knowledge and statements based upon information and belief. . . [s]tatements which are not based upon personal knowledge should be accompanied by an identification of the source of information which gives rise to the complainants belief in the truth of such statements. . ."); see also Federal Election Commission MUR 5878, Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Peterson (analyzing the heightened sufficiency standard for FEC complaints).

¹⁴ Providing that public communication with a federal candidate endorsing a non-federal candidate "is not a coordinated communication with respect to the endorsing Federal candidate unless the public communication promotes, supports, attacks, or opposes the endorsing candidate or another candidate who seeks election to the same office as the endorsing candidate." 11 C.F.R. § 109.21(g)(1).

oppose the Federal candidate.”¹⁵ As provided above in Part II(a)(i) of this Response, this communication does not include any PASO of a federal candidate, and meets the requirements of this safe harbor exception to a coordinated communication.

Additionally, as this was not a coordinated communication, it was also not an in-kind contribution to any of the federal candidates. As the Commission similarly explained in Advisory Opinion 2007-34, that since a federal candidate’s appearance on a billboard to endorse a non-federal candidate was not a coordinated communication under 11 C.F.R. § 109.21(g)(1), it also was not an in-kind contribution from the non-federal candidate to the federal candidate.¹⁶ Here, the ODP paid for the communication with non-federal funds, and there is nothing to indicate that the analysis would be any different if the funds came from a political party as opposed to a non-federal candidate.

Accordingly, the FEC should find that the ODP complied with the Act and Commission regulates for the communication in Exhibit A (also attached in full as Attachment 1).

III. Ms. Eagan’s Complaints Regarding Exhibits B, C, and D Do Not Have Merit.

a. Exhibits B, C, and D Are Internet Communications and Are Incomplete as Printed Documents

The communications attached as Exhibits B, C, and D of the Complaint are each incomplete documents as they are printed off of the ODP’s website, where the ODP has maintained a disclaimer that satisfies the Commission’s requirements.¹⁷ As Attachment 5, a screenshot of the ODP’s website disclaimer shows, the disclaimer says that the website is “paid for by the Ohio Democratic Party”, includes the ODP’s street address, and states that it has not been authorized by any candidate or candidate’s committee.¹⁸ Additionally, this disclaimer is readable, enclosed in a box, and written in white on a bright blue background so as to have color contrast.¹⁹ While the Complaint concedes that the ODP’s website includes a disclaimer, it fails to recognize that this is the only disclaimer required for these communications.

When considering Exhibits B, C, and D as individual Internet communications, each is still compliant with federal law. The Commission defines the scope of disclaimer requirements to include public communications and electioneering communications – both of which include

¹⁵ “Coordinated Communications,” 71 Fed. Reg. 33190, 33202 (June 8, 2006) (quoting 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002)).

¹⁶ Advisory Opinion 2007-34 at 2-3 (Jackson Jr.).

¹⁷ See 11 C.F.R. §§ 110.11(a)(1) (political committees’ websites require disclaimers), 110.11(b)(3), (c).

¹⁸ 11 C.F.R. § 110.11(b)(3).

¹⁹ See Attachment 5, Ohio Democratic Party, available at <https://ohiodems.org/> (last accessed December 12, 2016).

relevant exemptions in their definitions for Internet communications.²⁰ The Commission has explained that a public communication includes paid Internet advertising placed on another person's website but *does not encompass any other form of Internet communication.*²¹ To be certain, the Commission has discussed this exemption to include social networking platforms and "content placed by a State, district, or local party committee on its own Web site."²²

Here, Exhibits B, C, and D were initially on the ODP's website where the ODP maintains a proper disclaimer under federal law. *The ODP only encouraged individuals to use these documents for their personal use, or to place them on their personal social networking websites* (specifically, Facebook or Twitter). *At no point were Exhibits B, C, or D paid advertising*, not does the Complaint allege them to have been. As a result, Exhibits B, C, and D as individual Internet communications remain within the express exemptions to the definitions of public communications and are therefore outside the scope of federal disclaimer requirements.

As a result, given that the ODP's website contained the appropriate disclaimer under federal law, and as individual Internet communications and social media communications, Exhibits B, C, and D are exempt from disclaimer requirements; the ODP satisfied the Commission's disclaimer requirements for these Internet communications.

b. The Printed Versions of Exhibits B, C, and D Satisfy the Commission's Disclaimer Requirements

While Exhibits B, C, and D are all Internet communications exempt from the Commission's disclaimer requirements, the ODP also created and distributed separate versions of each of these sample ballots that were in full compliance with the Commission's disclaimer requirements. Each of these sample ballots may be found attached to this Response as Attachments 2, 3, and 4; each of these shows a clear and conspicuous disclaimer that is readable, enclosed in a box, and written in black or navy so as to have color contrast to the light background.²³

²⁰ 11 C.F.R. § 100.26 (providing that "[t]he term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person's Web site."), 11 C.F.R. § 100.29(c)(1) (excluding from the definition of electioneering communications, "communications over the Internet, including electronic mail."). See Concurring Statement of Chairman Matthew S. Petersen and Commissioners Lee E. Goodman and Caroline C. Hunter, Advisory Opinion 2016-06 (IAPAC) at 1-2, n. 5 (explaining the definitions of public communications and electioneering communications to conclude that "... unless Internet communications are placed for a fee on another person's website, they are not 'public communications' and cannot be coordinated communications."). See also 11 C.F.R. § 110.11(a) (scope of communications that require federal disclaimers).

²¹"Internet Communications" 71 Fed. Reg. 18589 (April 12, 2006); 11 C.F.R. § 100.26.

²² 71 Fed. Reg. at 18598 (April 12, 2006); Concurring Statement, Advisory Opinion 2016-06 (IAPAC) at 2, n. 6 (citing 71 Fed. Reg. 18589, 18608, n. 52).

²³ See 11 C.F.R. § 110.11(c)(1), (2). See Attachments 2, 3, 4.

The Commission's regulations provide specific disclaimer requirements for sample ballots like Exhibits B, C, and D.²⁴ Under 11 C.F.R § 110.11(e), a sample ballot only requires the language "Paid for by the XYZ State Party Committee."²⁵ The disclaimers on Attachments 2 and 3 state "Paid for by the Ohio Democratic Party, David Pepper, Chairman", and the disclaimer on Attachment 4 states, "Paid for by the Ohio Democratic Party"; accordingly, each disclaimer satisfies the Commission's requirements. As a result, *the ODP followed all federal disclaimer requirements when producing printed versions of the Internet communications attached to the Complaint.*

IV. Conclusion

As this Response provides, the ODP has not violated the Act or any of the Commission's rules with regard to Ms. Eagan's Complaint. Ms. Eagan first alleged that the ODP violated federal law with respect to a mailing that was paid for with non-federal funds to support state and local candidates and issues. When alleging that the ODP coordinated with federal candidates with regard to this mailing, Ms. Eagan failed to provide any evidence how or when this coordination may have occurred. Regardless, the appearance of the federal candidates are exempt from the definition of public communication under the Commission's endorsement safe harbor.

Ms. Eagan also alleged that the ODP violated federal disclaimer laws as related to Internet communications. These communications initially appeared on the ODP's website, where the ODP maintains a disclaimer that meets federal requirements. As Internet communications, Exhibits B, C, and D each were exempt from other disclaimer requirements. To be certain, Attachments 2, 3, and 4 demonstrate that the ODP fully complied with federal law when it printed versions of these communications.

Based upon the above, the Commission should immediately dismiss this matter. If you have any questions regarding this Response, my daytime number is (202) 479-1111. My email address is reiff@sandlerreiff.com.

Sincerely,



Neil P. Reiff

²⁴ The Complaint concedes that these communications are sample ballots. Complaint at 2, 3.

²⁵ Providing specifically that: "A public communication authorized by a candidate, authorized committee, or political party committee, that qualifies as an exempt activity under 11 CFR 100.140 [slate cards and sample ballots] . . . , must comply with the disclaimer requirements . . . but the disclaimer does not need to state whether the communication is authorized by a candidate, or any authorized committee or agent of any candidate." 11 C.F.R. 110.11(e). See also Federal Election Commission, "Special Notices on Political Ads and Solicitations", October 2006, available at <http://www.fec.gov/pages/brochures/notices.shtml> (last accessed November 29, 2016).



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T3 P13
 Franklin



Hillary Clinton



Ted Strickland



Joyce Beatty



Ed Albertson



Scott Wharton

Join us in endorsing your state and local Democratic candidates.

Cathy Johnson
 State Senate District 16

Bernadine Kennedy Kent
 State House District 25

Antoinette C. Miranda
 State School Board 6th District

Laurel A. Beatty
 Common Pleas Court

Adam Miller
 State House District 17

Hearcel F. Craig
 State House District 26

Stephanie Dodd
 State School Board 9th District

Richard A. Frye
 Common Pleas Court

Kristin Boggs
 State House District 18

Kevin Boyce
 Commissioner

Judge John P. O'Donnell
 Supreme Court Justice

Kimberly Cocroft
 Common Pleas Court

Michael Johnston
 State House District 19

John O'Grady
 Commissioner

Judge Cynthia Rice
 Supreme Court Justice

Jim Reese
 Common Pleas Court

Heather Bishoff
 State House District 20

Zach Klein
 Prosecuting Attorney

Jennifer Brunner
 10th District Court of Appeals

**Vote for Issues
 1, 2, 3, & 4
 City of Columbus
 Bond Issues**

Ryan Koch
 State House District 21

Maryellen O'Shaughnessy
 Clerk of Courts

Julia L. Dorrian
 10th District Court of Appeals

**Vote for Issue 57
 Columbus School
 Improvement Plan**

David Leland
 State House District 22

Dallas L. Baldwin
 Sheriff

Crysta Pennington
 Common Pleas Court

Lee Schreiner
 State House District 23

Danny O'Connor
 Recorder

Mark A. Serrott
 Common Pleas Court

**Vote Yes on Issue 60
 COTA Renewal.**

Kristopher Keller
 State House District 24

Anahi Ortiz
 Coroner

Jeffrey M. Brown
 Common Pleas Court

Vote early or on **ELECTION DAY NOV. 8.** OhioTogether.com

Standing up for Franklin County



Zach Klein
 Prosecuting Attorney

- A prosecutor for the 21st century
- Keeping our families and neighborhoods safe



Danny O'Connor
 Recorder

- A reformer, committed to service with integrity
- A champion of veterans, homeowners, and small businesses

16084747108210

Ohio Democrats are STRONGER TOGETHER

Attachment 2
Side 1 of 2



Ohio Democratic Party Official Sample Ballot

Hillary Clinton and Tim Kaine
United States President & Vice President

Ted Strickland
United States Senate

John Tharp
Sheriff

Marcy Kaptur
United States Rep - 9th District

Phillip D. Copeland
Recorder

James Neu, Jr.
United States Rep - 5th District

Wade Kapszukiewicz
Treasurer

Kirk Halliday
State Senate District 2

Keith Earley
Engineer

Michael Ashford
State House District 44

James Patrick
Coroner

Teresa Fedor
State House District 45

Judge John P. O'Donnell
Supreme Court Justice

Michael P. Sheehy
State House District 46

Judge Cynthia Rice
Supreme Court Justice

Lauri Cooper
State House District 47

Gary Cook
6th District Court of Appeals

Tina Skeldon Wozniak
Commissioner

Mark L. Pietrykowski
6th District Court of Appeals

Pete Gerken
Commissioner

Dean Mandros
Common Pleas Court

Julia Bates
Prosecuting Attorney

Lindsay Navarre
Common Pleas Court

Bernie Quilter
Clerk of Courts

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1000441-0000000000



**As Governor, TED STRICKLAND
Put Ohio on the Road to Economic Recovery**

- Ted helped rescue the auto industry and helped save 160,000 Ohio jobs
- He balanced every budget, oversaw a tax cut for every Ohioan, protected funding for education and froze college tuition costs

**Now TED STRICKLAND is Ready to
Fight for Ohio Families in the US Senate**

- Ted opposes raising the Medicare retirement age and he wants to expand Social Security benefits
- He will create thousands of jobs by creating an infrastructure bank to rebuild our nation's roads and bridges — paid for by closing loopholes that allow large corporations to avoid paying their fair share of taxes

 OHIO DEMOCRATIC PARTY  



1. Vote early or on
Election Day Nov. 8.



2. Text **FIGHT** to 90975
to get involved.



3. Learn more at:
www.OhioTogether.com

(DISCLAIMER: ODP WILL NEVER CHARGE YOU FOR TEXT ALERTS.
SEE YOUR CARRIER'S USE & DATA RATES THAT APPLY.)

Attachment 3
Side 2 of 2

Attachment 4

1004474440001

1103047411001001001001

Attachment 4
Side 2 of 2

Franklin County Democratic Party Official Sample Ballot



"Every race is important this year. We need to make sure we elect leaders we can trust, like Zach Klein for County Prosecutor."

*-Andrew J. Gritter
Columbus Mayor*



"In this important Election be sure to vote for every Democrat and Issue on your ballot."

*-Michael B. Coleman
Former Columbus Mayor*

STRONGER TOGETHER

Thank you for voting early! Now let's make sure that we get other voters out to the polls and get Democrats up and down the ticket elected.

**Sign up to volunteer before or on Election Day on our website:
www.fcdp.org/volunteer**



Paid for by the Ohio Democratic Party

Attachment 5

1005474001

President Donald Trump has now tapped six big donors and fundraisers to serve in his administration, lining up an unprecedented concentration of wealthy backers for top posts.

Together with their families, Trump's nominees gave \$11.6 million to support his presidential bid, his allied super PACs and the Republican National Committee, according to a Washington Post analysis of federal campaign filings.



CONTACT	ABOUT THE OHIO DEMOCRATIC PARTY	DONOR INFORMATION
MEMBERSHIP	POLITICAL ACTION COMMITTEES	REPUBLICAN PARTY
PACs	POLITICAL ACTION COMMITTEES	POLITICAL ACTION COMMITTEES
POLITICAL ACTION COMMITTEES	POLITICAL ACTION COMMITTEES	POLITICAL ACTION COMMITTEES


OHIO DEMOCRATIC PARTY

OHIO DEMOCRATIC PARTY
1000 EAST WASHINGTON AVENUE, SUITE 1000
COLUMBUS, OHIO 43219-1000

16044447886-1



FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

STATEMENT OF DESIGNATION OF COUNSEL
Please use one form for each Respondent/Entity/Treasurer
FAX (202) 219-3923

OFFICE OF GENERAL COUNSEL

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DEC 12 AM 11:10

MUR # 7.154

NAME OF COUNSEL: The Ohio Democratic Party

FIRM: Sandler Reiff Lamb Rosenstein & Birkenstock

ADDRESS: 1025 Vermont Ave, NW, Suite 300

Washington, DC 20005

TELEPHONE- OFFICE (202) 479-1111

FAX (202) 479-1115 Web Address sanderreiff.com

The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

12/12/16
Date

[Signature]
Respondent/Agent -Signature

Assistant Treasurer
Title(Treasurer/Candidate/Owner)

RESPONDENT: The Ohio Democratic Party
(Committee Name, Company Name, or Individual Named in Notification Letter)

MAILING ADDRESS: 340 East Fulton Street
(Please Print)

Columbus, OH 43215

TELEPHONE- HOME

BUSINESS (614) 221-6563 ext. 1108

Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation

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